

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Level 3 Communications LLC	)	
	)	WC Docket No. 03-266
Petition for Forbearance Under	)	
47 U.S.C. § 160(c) from Enforcement	)	
of 47 U.S.C. § 251(g), Rule 51.701(b)(1)	)	
and Rule 69.5(b)	)	
	)	

**REPLY COMMENTS OF  
ICG TELECOM GROUP, INC.**

ICG Telecom Group, Inc. (“ICG”), by its undersigned attorneys, files these reply comments in support of Level 3 Communications, LLC’s (“Level 3”) Petition for forbearance.<sup>1</sup> As noted in ICG’s original comments, ICG urges the Commission to forbear from assessing access charges on voice-embedded IP communications while the Commission completes its comprehensive review of intercarrier compensation.<sup>2</sup>

In the initial round of comments, more than 40 parties filed comments. In response to some of the comments filed in this docket, ICG offers these reply comments and urges the Commission to forbear.

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<sup>1</sup> See *Level 3 Communications LLC Petition for Forbearance under 47 U.S.C. § 460(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.71(b)(1) and Rule 69.5*, WC Docket No. 03-266, (filed December 23, 2003) (“Level 3 Petition”).

<sup>2</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001) (“*Intercarrier Compensation NPRM*”).

## **II. IMMEDIATE COMMISSION ACTION IS NEEDED TO CLARIFY THE REGULATORY ENVIRONMENT TO ALLOW INNOVATIVE IP-BASED SERVICES TO DEVELOP.**

### **A. Lack of Regulatory Certainty Will Reduce Investment by New Entrants to the Detriment of Consumers.**

In their submissions, ILECs claim that IP-PSTN services are subject to access charges and threaten to impose liability for these charges on IP-PSTN service providers.<sup>3</sup> The mere threat of liability for access charges will reduce and even chill investment in new networks and advanced services.<sup>4</sup> Moreover, the potential of liability unsettles the business environment and makes it difficult for carriers such as ICG, and the financial community, to evaluate new investments in IP-based services. Carriers and investors would be reluctant to put new money into ventures that have potential liability. The Commission can remove the uncertainty regarding prospective charges by acting quickly to grant Level 3's Petition.

As SBC recognizes in other dockets,<sup>5</sup> IP networks currently are unable to track the geographic end-points of IP communications. Developing technologies to track these end-points and making modifications to the networks in order to accommodate an antiquated, patched-up access charge system would require substantial investments by IP-PSTN providers, which would be utterly unnecessary. Forcing IP-PSTN providers to make significant investments in tracking the end-points of communications would divert capital to unproductive uses solely to prop up the badly-broken access charge regime. Capital is better spent on new and efficient products and services, rather than on old regulations.

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<sup>3</sup> See BellSouth Comments at 5-6; Verizon Comments at 2-3.

<sup>4</sup> For instance, Global Crossing has already held back the expansion of its IP services. See Global Crossing Comments at 5.

<sup>5</sup> See *Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP a Declaratory Ruling on IP-Platform Services*, WC Docket No. 04-29 (Filed February 5, 2004), at 37-38 (tracking endpoints is "theoretically possible" but would be a "useless, inefficient technological capability[y]" that "would improve neither service nor efficiency.")

Immediate Commission action is necessary to gain certainty and continue the deployment of advanced services to the benefit of all Americans.<sup>6</sup> Without immediate Commission action, the ILECs will tie up new entrants with endless arbitrations and litigation and consumers will be forced to continue overcompensating inefficient legacy providers.

**B. Level 3 Has Met its Regulatory Burden and Forbearance is Warranted.**

Unlike other petitions for a declaratory ruling, the Level 3 Petition does not ask the Commission to determine whether IP-PSTN services are eligible for the Enhanced Service Provider (“ESP”) exemption. Rather, the Level 3 Petition requires the Commission to determine that imposing access charges on IP-PSTN services is not in the public interest, not necessary to protect consumers, and not necessary to ensure that the charges and practices of IP-PSTN providers are just and reasonable. Level 3 has demonstrated that its Petition meets the statutory standard for forbearance and is in the public interest.<sup>7</sup> By forbearing from enforcing Sections 251(g) of the Act and Rules 51.701(b)(1) and 69.5(b) for voice-embedded IP communications, the Commission would give regulatory certainty and would incent the development of advanced services and networks to the benefit of consumers.

**II. IP-PSTN SERVICES PROMOTE THE DEPLOYMENT OF BROADBAND NETWORKS TO THE BENEFIT OF CONSUMERS.**

Providers of IP-PSTN traffic spur adoption of broadband, furthering the goals of Section 706 to achieve universal broadband for all Americans.<sup>8</sup> The United States is lagging behind other developed nations in broadband deployment to the detriment of consumers in higher cost

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<sup>6</sup> See CompTel/ASCENT Alliance Comments at 6.

<sup>7</sup> See Level 3 Petition at 38-54. See also AT&T Comments at 17-21; Broadwing Communications Comments at 7-9.

<sup>8</sup> See Broadwing Comments at 3-4; Pinpoint Comments at 2-4, 6.

areas.<sup>9</sup> The Commission should promote the development of new, modern networks, rather than maintaining legacy, fully amortized copper networks. As noted recently by President Bush, "[w]e ought to have universal, affordable access to broadband technology by the year 2007... and then we ought to make sure that as soon as possible thereafter consumers have plenty of choices..."<sup>10</sup> VoIP along with other broadband-intensive applications may be the catalyst for further investment in new facilities in underserved areas, thereby achieving the goals of Universal Service.

Broadband deployment can provide competitive choices to consumers who are in areas that are traditionally devoid of competition. Deployment of broadband will enhance the competitive choices of customers by providing access to broadband-driven applications, such as VoIP, high-speed Internet access and telemedicine. Because broadband can provide a platform for numerous applications, the encouragement of further broadband deployment not only benefits consumers by providing increased choice, but also furthers the goals of Universal Service by increasing competitive choice in traditionally underserved areas.

Imposing inflated access charges on IP-PSTN traffic will slow broadband adoption and innovation in IP services. As noted by CompTel/Ascent, IP communications represent the cutting edge of advanced communications capabilities in the United States.<sup>11</sup> By forbearing at this time, the Commission would encourage rapid deployment of these advanced services to the benefit of consumers.

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<sup>9</sup> According to the ITU, the number of worldwide broadband subscribers grew 72% in 2002 to approximately 63 million. However, according to the Commission's own data the number of broadband lines only increased by 18% in the United States. See *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003).

<sup>10</sup> Remarks of President Bush at the 24<sup>th</sup> Annual Homebuilders and Remodelers Showcase, Albuquerque, New Mexico, March 26, 2004.

<sup>11</sup> CompTel/Ascent Coalition Comments at 4.

### III. ACCESS CHARGES SHOULD NOT SUBSIDIZE LOCAL RATES

#### A. ILECs Fail to Recognize that IP-PSTN Providers Adequately Compensate ILECs for their Services.

ILECs fail to acknowledge that if the Commission grants the Level 3 Petition, providers of IP-PSTN traffic will continue to adequately compensate LECs for use of their networks, either through local business rates<sup>12</sup> or cost-based reciprocal compensation. Not satisfied with this compensation, ILECs are trying to force IP-PSTN providers to move from existing services to non-cost-based access services in an effort to maintain their access charge revenue stream. The fact that ILECs have historically enjoyed an access charge revenue stream does not mean that they are entitled to receive those revenues in perpetuity.

An examination of the public interest requires that the Commission evaluate the benefits the VoIP access charge exemption provides to the entire public, not just to ILECs. Even if ILECs' arguments of lost revenue streams are true,<sup>13</sup> any temporary shortfall in an ILEC's current revenue stream does not automatically result in public detriment. ILECs must first show that they will suffer economic loss. Then they must show that the economic loss is caused by VoIP. And finally, they must show that any such economic loss impairs their ability to serve the public. Email and wireless services have already reduced traditional wireline long distance calling, and thus ILEC access revenue. CLECs' increased market share has also reduced ILEC access revenue. Finally, reforms at the federal and state levels have generally reduced ILEC access revenue. In fact, JP Morgan estimates that total switched access revenue for the industry

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<sup>12</sup> *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 16133-34 (para. 346) (1997), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). ("[W]e also are not convinced that the non-assessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services.").

<sup>13</sup> See Nebraska Independent Rural Independent Companies Comments at 3-4; Sprint Communications Comments at 4; Verizon Comments at 18.

fell from \$14.3 billion in 1999 to an estimated \$7.9 billion in 2004.<sup>14</sup> While the Interstate Access Support created in the *CALLS* Order<sup>15</sup> essentially restores \$650 million of lost access revenue to price cap ILECs annually in an explicit subsidy, recent history shows that ILECs can and are continuing to serve the public notwithstanding substantial decreases in access revenue.

The Commission should not refuse to forbear simply to protect revenue streams of inefficient incumbent legacy network providers. As recently noted by Commissioner Martin:

“[i]f incumbents want to seize this opportunity, they cannot sit idly by or wait for the Commission to save them. The way toward new revenue streams is not to focus on the market with the declining number of subscribers and shrinking margins. It is to invest in the infrastructure to provide new services that will be the growth areas in the future: increasing number of subscribers with higher margins, and bundling those services with traditional local voice services to retain their base. There, regulations will not hold you back.”<sup>16</sup>

Rather, the Commission should apply the standards of Section 10 and grant the relief requested by Level 3.

**B. ILECs are Benefiting Directly from VoIP Offerings.**

ILEC claims of revenue loss<sup>17</sup> not only lack any basis, but also ignore other sources of ILEC revenue, including broadband and ILECs’ own VoIP offerings. Indeed, ILECs recognize and expect to benefit from diversified revenue streams, such as broadband and VoIP. As Verizon’s Chief Executive Officer Seidenberg has stated: “Our view is to let cannibalization occur.” Seidenberg has said that while VoIP probably would reduce Verizon’s local phone

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<sup>14</sup> J P Morgan “U.S. Telecommunications the Art of War,” (Nov. 7, 2003) p. 11.

<sup>15</sup> See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance User, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, (2000) (*CALLS*).

<sup>16</sup> Remarks of Commissioner Kevin Martin, 21<sup>st</sup> Institute on Telecommunications Policy and Regulation, Washington, D.C., December 5, 2003.

<sup>17</sup> See e.g., America’s Rural Consortium Comments at 5-6; National Telecommunications Cooperative Association Comments at 3; Nebraska Rural Independent Companies Comments at 3-4.

market share from 90% to 60%, Verizon plans to participate in VoIP both as a backbone provider and as an ISP, “meaning more revenue per customer.”<sup>18</sup>

ILECs can and are competing in the market for VoIP services. For instance, SBC IP Communications (“SBCIP”) is providing VoIP services to enterprise customers both within and outside of SBC’s monopoly telephone markets.<sup>19</sup> In turn, Qwest has announced plans to enter the residential VoIP market in Minnesota, where it is an ILEC, and has confirmed that it already offers VoIP to enterprise customers.<sup>20</sup>

In essence, ILECs want two bites at the apple. First, they are requesting the Commission to extend the antiquated and arbitrary access charge system to a technology that is clearly not subject to these charges in order to maintain subsidies for their inefficient narrowband networks. Second, ILECs intend to increase their revenues by offering VoIP services, even as they go out of their way to ensure that VoIP and VoIP providers subsidize their traditional narrowband networks.

In sum, the Commission should not be persuaded by the ILECs claims of revenue loss from their switched access service, while at the same time ILECs engage in the same conduct they so vocally complain about.

**C. ILECs Threats of Increase in Local Service Rates to the End User are Contrary to the Act.**

Access charges are inflated and contain subsidies. ICORE's suggestion that lower-cost IP services should pay even higher access charges than traditional IXCs<sup>21</sup> is ludicrous and shows the ILECs' true motive is to increase unwarranted subsidies to prop up their narrowband networks.

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<sup>18</sup> Communications Daily (June 20, 2001).

<sup>19</sup> Michael Bazeley, “SBC offers businesses new VoIP service,” Mercury News (Nov. 21, 2003).

<sup>20</sup> “Notebaert Announces Qwest Will Offer VoIP to Consumers,” Communications Daily, 5 (Nov. 5, 2003).

The ILECs threaten that they will be forced to raise end user customer rates if access charge revenue streams diminish.<sup>22</sup> Their unwarranted concern strongly suggests that ILECs are using access charges to subsidize their provision of service to their local end users. Section 254(e) of the Communications Act of 1934, as amended, however, provides that universal service support “should be explicit.”<sup>23</sup> Indeed, the Fifth Circuit made clear in *TOPUC* that Section 254(e) prohibits the FCC from maintaining implicit subsidies for universal service support.<sup>24</sup> The Fifth Circuit further concluded that requiring ILECs to recover their universal service contributions from their interstate access charges constituted an implicit subsidy “in violation of a plain, direct statutory command” under Section 254(e) of the Act.<sup>25</sup>

It appears that the ILECs are doing exactly what Section 254(e) prohibits – using access charge revenues as an implicit subsidy to provide universal service support to their customers. If this is true, the Commission should take immediate action to extract any implicit subsidies from access charges, not force VoIP providers to sustain such illegal subsidies by moving their traffic from cost-based local retail and termination services to above-cost access services.

#### **IV. GRANTING LEVEL 3’S PETITION IS CONSISTENT WITH THE INDUSTRY CONSENSUS THAT ALL INTERCARRIER COMPENSATION SHOULD CONVERGE TO A SINGLE RATE**

The Commission should not impose antiquated and utterly complex access charges on IP-PSTN communications. Various parties agree with Level 3 that the current access charge system

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<sup>21</sup> See ICORE Comments at 8.

<sup>22</sup> See e.g., Verizon Comments at 15; ICORE Comments at 13-16; Independent Telephone and Telecommunications Alliance, et. al. Comments at 4.

<sup>23</sup> 47 U.S.C § 254(e).

<sup>24</sup> *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5<sup>th</sup> Cir. 1999) (*TOPUC*) (“we are convinced that the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.”).

<sup>25</sup> *Id.*; see also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5<sup>th</sup> Cir. 2000) (“we made clear in *TOPUC* that the implicit/explicit distinction turns on the distinction between direct subsidies from support funds and recovery through access charges and rate structures.”).



is an unsustainable hodgepodge of antiquated regulations that may not be kept for long.<sup>26</sup> Moreover, in recent statements, Commissioner Copps noted that access charges are on “their way to the realm of historical curiosity.”<sup>27</sup>

According to press reports,<sup>28</sup> the Inter-carrier Compensation Forum (“ICF”), which is comprised of varied industry participants, is currently working on a proposal that they expect to submit to the FCC soon and will reportedly recommend replacing access charges with bill and keep. Another industry group, which is opposed to bill and keep, is developing a unified, cost-based inter-carrier compensation proposal for the FCC’s consideration. If the Commission adopts a unified inter-carrier compensation mechanism, it would simplify the anachronistic access charge system and would permit carriers to have more certainty in their compensation mechanisms. As ICG and others noted in initial comments, it would be illogical to upset the *status quo* and impose access charges on IP-PSTN communications now, only to remove them at a later date.<sup>29</sup> Instead, the public interest favors forbearing to preserve the *status quo* pending completion of the *Inter-carrier Compensation* proceeding.<sup>30</sup>

By granting the Level 3 Petition and forbearing until the Commission completes its comprehensive review of *Inter-carrier Compensation*, the Commission would give regulatory certainty to the industry, would promote investment in new networks and would incent advanced, low-cost, high-quality services for all Americans. On the other hand, failure to grant Level 3’s Petition would likely lead to disruption, as ILECs and states would attempt to impose

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<sup>26</sup> See MCI Comments at 5-7; Progress and Freedom Foundation Comments at 2-3;

<sup>27</sup> Remarks of Commissioner Michael J. Copps, Quello Center Symposium, Washington, D.C., February 25, 2004.

<sup>28</sup> Communications Daily (March 18, 2004).

<sup>29</sup> See Level 3 Petition at 40; AT&T Comments at 19; CompTel/ASCENT Alliance Comments at 6; ITAA Comments at 2; Progress and Freedom Foundation at 3; USA Datanet Comments at 8.

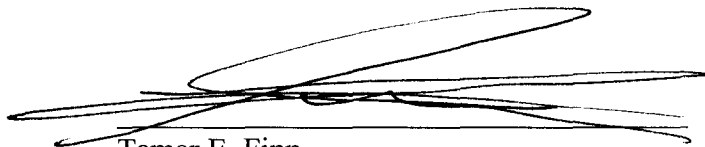
<sup>30</sup> See CompTel/ASCENT Alliance Comments at 2-3;

access charges that will inevitably be inconsistent with the Commission's ultimate resolution in the *VoIP* and *Intercarrier Compensation* proceedings.<sup>31</sup>

## V. CONCLUSION

For the foregoing reasons and the reasons noted in ICG's initial comments, the Commission should grant Level 3's Petition and forbear without delay from imposing access charges on voice-embedded IP communications as defined in Level 3's Petition.

Respectfully submitted,



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<sup>31</sup> See ATT Comments at 19.

I, Ulises R. Pin, hereby certify that on this 31<sup>st</sup> day of March, 2004, the foregoing Reply Comments of ICG Telecom Group, Inc., were filed electronically on the Commission's ECFS in accordance with the Commission's rules and copies were served by email or first class mail (postage prepaid) on the following:

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